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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

13 THON NGOT SANG, ) 1:05-CV-0628 OWW SMS HC  
14 Petitioner, ) ORDER REQUIRING RESPONDENT TO FILE  
15 ) RESPONSE  
16 v. ) ORDER SETTING BRIEFING SCHEDULE  
17 ) ORDER DIRECTING CLERK OF COURT TO  
18 A. K. SCRIBNER, Warden, ) SERVE DOCUMENTS ON ATTORNEY  
19 Respondent. ) GENERAL

20 Petitioner is a state prisoner proceeding pro se with a Petition for Writ of Habeas Corpus  
21 pursuant to 28 U.S.C. § 2254.

22 The Court has conducted a preliminary review of the Petition. Accordingly, pursuant to Rule  
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24 4 of the Rules Governing Section 2254 Cases and Rule 16 of the Federal Rules of Civil Procedure,<sup>1</sup>  
the Court HEREBY ORDERS:

1       1. Respondent SHALL FILE a RESPONSE. A Response can be made by filing one of the  
2       following:

3       A. AN ANSWER addressing the merits of the Petition and due within **NINETY (90)**

4       days of the *date of service* of this order. Rule 4, Rules Governing Section 2254

5       Cases; Cluchette v. Rushen, 770 F.2d 1469, 1473-1474 (9<sup>th</sup> Cir. 1985) (court has  
6       discretion to fix time for filing an Answer.).

7       – Respondent SHALL INCLUDE with the Answer any and all transcripts or other  
8       documents necessary for the resolution of the issues presented in the Petition.  
9       Rule 5 of the Rules Governing Section 2254 Cases.

10       – Any argument by Respondent that Petitioner has *procedurally defaulted* a  
11       claim(s) SHALL BE MADE in an ANSWER that also addresses the merits of the  
12       claims asserted. This is to enable the Court to determine whether Petitioner meets  
13       an exception to procedural default. See, Paradis v. Arave, 130 F.3d 385, 396 (9<sup>th</sup>  
14       Cir. 1997) (Procedurally defaulted claims may be reviewed on the merits to serve  
15       the ends of justice); Jones v. Delo, 56 F.3d 878 (8<sup>th</sup> Cir. 1995) (the answer to the  
16       question that it is more likely than not that no reasonable juror fairly considering  
17       all the evidence, including the new evidence, would have found Petitioner guilty  
18       beyond a reasonable doubt necessarily requires a review of the merits).

19       – Petitioner's TRAVERSE, if any, is due **THIRTY (30)** days from the date  
20       Respondent's Answer is filed with the Court.

21       B. A MOTION TO DISMISS due within **SIXTY(60)** days of the *date of service* of this  
22       order based on the following grounds:<sup>2,3</sup>

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24       <sup>2</sup>Rule 4 of the Rules Governing Section 2254 Cases provides that upon the court's determination that summary  
25       dismissal is inappropriate, the "judge shall order the respondent to file an answer or *other pleading . . . or to take such other*  
26       *action as the judge deems appropriate.*" Rule 4, Rules Governing Section 2254 Cases (emphasis added); see, also, Advisory  
27       Committee Notes to Rule 4 and 5 of Rules Governing Section 2254 Cases (stating that a dismissal may obviate the need for  
28       filing an answer on the substantive merits of the petition and that the Attorney General may file a Motion to Dismiss for  
failure to exhaust.); also, White v. Lewis, 874 F.2d 599, 60203 (9<sup>th</sup> Cir.1989) (providing that Motions to Dismiss pursuant  
to Rule 4 are proper in a federal habeas proceeding.)

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28       <sup>3</sup>Pursuant to Rule 16 of the Federal Rules of Civil Procedure, the parties must seek leave of court before submitting  
any pleading not contemplated by this Order. Fed.R.Civ.P. 16(e).

1 (1) STATUTE OF LIMITATIONS - 28 U.S.C. § 2244(d)(1). A Motion to Dismiss  
2 the Petition as filed beyond the one year limitations period SHALL INCLUDE  
3 copies of all Petitioner's state court filings and dispositive rulings.

4 (2) SECOND OR SUCCESSIVE Petitions - 28 U.S.C. § 2244(b). A Motion to  
5 Dismiss the Petition on the basis of § 2244(b) SHALL include a copy of the  
6 previously filed federal Petition and disposition thereof.

7 2. OPPOSITIONS to Motions to Dismiss SHALL be served and filed within EIGHTEEN  
8 (18) days, plus three days for mailing. All other Oppositions SHALL be served and filed  
9 within EIGHT (8) days, plus three days for mailing. REPLIES to Oppositions to Motions  
10 to Dismiss SHALL be served and filed within eight (8) days, plus three days for mailing.  
11 Replies to Oppositions to all other Motions SHALL be served and filed within eight (8)  
12 days, plus three days for mailing. If no opposition is filed, all motions are deemed  
13 submitted at the expiration of the opposition period.

14 3. Unless already submitted, both Respondent and Petitioner SHALL COMPLETE and  
15 RETURN to the Court along with the Response or Motion to Dismiss, a Consent form  
16 indicating whether the party consents or declines to consent to the jurisdiction of a the  
17 United States Magistrate Judge pursuant to Title 28 U.S.C. § 636(c)(1).

18 4. RESPONDENT SHALL submit a Notice of Appearance as attorney of record within  
19 **SIXTY (60)** days of the date of service of this order for purposes of service of court  
20 orders. See, Local Rule 83-182(a), 5-135(c).

21 5. The Clerk of the Court is DIRECTED to SERVE a copy of this order along with a copy  
22 of the PETITION and any exhibits/attachments, on the Attorney General or his  
23 representative.<sup>4</sup>

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28     <sup>4</sup>If, however, the Petition was filed on January 3, 2005, or thereafter, the Clerk of the Court need not serve a copy  
of the Petition on the Attorney General or his representative. A scanned copy of the Petition is available in the Court's  
electronic case management system ("CM/ECF").

1 All motions shall be submitted on the record and briefs filed without oral argument unless  
2 otherwise ordered by the Court. Local Rule 78-230(h). All provisions of Local Rule 11-110 are  
3 applicable to this order.

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6 IT IS SO ORDERED.

7 **Dated: September 14, 2005**  
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8 **/s/ Sandra M. Snyder**  
9 UNITED STATES MAGISTRATE JUDGE

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